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No.

In the Supreme Court of the United States

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL COMPANY

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

BELLAIRE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701-9722 (1994 & Supp. V 1999), established the United Mine Workers of America Combined Benefit Fund (Combined Fund) to ensure the continued provision of health-care benefits to retired coal miners and their dependents who worked under collective bargaining agreements that promised such benefits. Those benefits are financed principally through premiums that must be paid to the Combined Fund by "signatory operators" that employed miners under those collective bargaining agreements and are assigned responsibility for their retired miners' benefits. The Act provides that the Commissioner of Social Security "shall, before October 1, 1993," assign responsibility for each eligible retired coal miner to the signatory operator that employed the miner (or to a "related person" of the signatory operator). 26 U.S.C. 9706(a). The Commissioner was unable, however, to complete all such assignments before October 1, 1993.

The question presented is whether the Commissioner's assignments of responsibility for retired miners that were made on or after October 1, 1993, are void.

PARTIES TO THE PROCEEDINGS

In *Barnhart* v. *Peabody Coal Co.*, the petitioner is the Commissioner of Social Security. Respondents are Peabody Coal Company and Eastern Associated Coal Company.

In *Barnhart* v. *Bellaire Corp.*, the petitioner is the Commissioner of Social Security. Respondents are Bellaire Corporation, Nacco Industries, Inc., and North American Coal Corporation. Also named as respondents in *Bellaire* (but aligned below with the Commissioner) are the Trustees of the United Mine Workers of America Combined Benefit Fund: Michael H. Holland, William P. Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. Van Horn, and Gail R. Wilensky. We are informed that the Trustees will file a separate petition for a writ of certiorari.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals in *Peabody Coal* (App., *infra*, 1a-2a) is unpublished, but the decision will be noted in a table in the *Federal Reporter*. The orders of the district court in *Peabody Coal* (App., *infra*, 5a-11a) are unreported.

The opinion of the court of appeals in *Bellaire* (App., *infra*, 3a-4a) is unpublished, but the decision will be

noted in a table in the *Federal Reporter*. The order of the district court in *Bellaire* (App., *infra*, 14a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals in *Peabody Coal* was entered on June 21, 2001, and in *Bellaire* on June 22, 2001. On September 12, 2001, Justice Stevens extended the time within which to file a petition for a writ of certiorari in the two cases to and including October 19, 2001, and October 20, 2001, respectively. On October 10, 2001, Justice Stevens further extended the time within which to file a petition in the two cases to and including November 18, 2001, and November 19, 2001, respectively.

The jurisdiction of this Court in each case is invoked under 28 U.S.C. 1254(1). Because the judgments of the court of appeals involve an identical legal issue, a single petition for a writ of certiorari seeking review of both judgments is filed pursuant to this Court's Rule 12.4.

STATUTORY PROVISION INVOLVED

Section 9706(a) of Title 26, United States Code, provides:

> For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

> (1) First, to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
>
> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
>
> (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701-9722 (1994 & Supp. V 1999), in response to a crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of health-care benefits that had been promised under collective bargaining agreements. In the 1980s and 1990s, the financial

stability of private multi-employer plans that had been established by the coal industry to finance those benefits was threatened by increasing health-care costs and the termination of employers' contribution obligations as coal mine operators switched to non-union employees or left the coal mining business altogether. As more companies stopped contributing to the plans, the remaining contributors were forced to shoulder more of the costs, which in turn led to even more defections and created a downward spiral. See generally *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 504-514 (1998) (plurality opinion).

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry] retirees," to "allow for sufficient operating assets for [such] plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Pub. L. No. 102-486, Tit. XIX, § 19142, 106 Stat. 3037. In furtherance of those ends, the Coal Act established a private multi-employer plan known as the United Mine Workers of America Combined Benefit Fund (Combined Fund or Fund). The Combined Fund provides health-care benefits to individuals who, at the time the Act was passed, were receiving benefits from the multi-employer plans previously established by collective bargaining in the coal industry. See 26 U.S.C. 9702, 9703(f). The Combined Fund is financed principally by premiums paid by the "signatory operators" (or "related persons" of those signatory operators) that formerly employed the retired miners who are beneficiaries of the Fund, and that remain in business. 26 U.S.C. 9704, 9706(a). The Act defines "signatory

operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1); see 26 U.S.C. 9701(b)(1) (identifying relevant "coal wage agreements").

b. The Act vests in the Commissioner of Social Security (Commissioner) the responsibility for assigning retired miners who are eligible for benefits from the Combined Fund to signatory operators or related persons of those operators. 26 U.S.C. 9706(a). Assignments are made according to a three-tiered hierarchy:

First, the Commissioner must first seek to assign a beneficiary to the signatory operator (or "related person") that remains "in business," signed a coal wage agreement in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for at least two years. 26 U.S.C. 9706(a)(1). The Act specifies that "a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. 9701(c)(7).

Second, if an assignment of a particular beneficiary cannot be made under the first tier, the Commissioner must attempt to assign the beneficiary to the signatory operator (or related person) that remains in business, signed a coal wage agreement in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for any period of time. 26 U.S.C. 9706(a)(2).

Third, if an assignment cannot be made under the first or second tier, the Commissioner must attempt to assign the beneficiary to the signatory operator (or related person) that remains in business and employed the miner in the coal industry for a longer period of time than any other signatory operator prior to the

effective date of the 1978 collective bargaining agreement. 26 U.S.C. 9706(a)(3).[1]

Finally, if an assignment cannot be made under any of the three tiers, then the beneficiary is considered "unassigned." See 26 U.S.C. 9704(a)(3) and (d). To assure that health-care benefits are paid for those beneficiaries, each signatory operator or related person that has been assigned a beneficiary may be assessed an additional "unassigned beneficiary premium" to be paid to the Combined Fund. 26 U.S.C. 9704(a). That premium represents each signatory operator's or related person's *pro rata* share of the total unmet benefit costs of unassigned beneficiaries. See 26 U.S.C. 9706(d) and (f). For example, if an operator were responsible for one percent of all assigned beneficiaries, it would also be responsible for one percent of the unmet benefit costs of all unassigned beneficiaries.

When the Commissioner assigns a Combined Fund beneficiary to a signatory operator or related person, he so notifies the assigned operator, 26 U.S.C. 9706(e)(2), which then has 30 days to request "detailed information as to the work history of the beneficiary and the basis of the assignment," 26 U.S.C. 9706(f)(1). After receiving that information, the assigned operator has an additional 30 days to request further administrative review of the assignment decision. 26 U.S.C. 9706(f)(2). If, on review, the Commissioner determines that an assignment was incorrect, she rescinds the

[1] In *Eastern Enterprises*, this Court struck down as unconstitutional an application of the third tier to a signatory operator that had not signed a 1974 or later coal wage agreement. See *Eastern Enters.*, 524 U.S. at 504 (plurality opinion); *id.* at 539 (opinion of Kennedy, J., concurring in the judgment and dissenting in part). The *Eastern Enterprises* decision is not relevant to this case, which involves only an issue of statutory construction.

assignment and reviews the beneficiary's record to determine whether the beneficiary should be assigned to another operator. 26 U.S.C. 9706(f)(3)(A). If the Commissioner determines that there was no error in the assignment, she so notifies the assigned operator. 26 U.S.C. 9706(f)(3)(B).

c. The Coal Act also provided two additional sources of financing for the health-care benefits of unassigned beneficiaries; signatory operators (and their related persons) may be required to pay an additional unassigned-beneficiary premium only if those two other sources prove insufficient for the benefit costs of unassigned beneficiaries. First, the Act directed that $210 million be transferred from the 1950 United Mine Workers of America Pension Plan, a multi-employer plan that had been established to finance retirement benefits of miners who had retired before 1976. A portion of those transfers was to be applied to reduce any unassigned-beneficiary premium liability for plan years commencing on or after October 1, 1993, while those funds remained available. See 26 U.S.C. 9705(a)(1) and (3)(B). In addition, for fiscal years beginning on or after October 1, 1995, the Coal Act authorizes transfers of interest earned on the Department of the Interior's Abandoned Mine Land Reclamation Fund (AML Fund), and specifies that those transferred monies are to be used to reduce the unassigned-beneficiary premium liability for the fiscal year in which the transfer is made. 26 U.S.C. 9705(b); 30 U.S.C. 1232(h).[2]

[2] The AML Fund was established by the Surface Mining Control and Reclamation Act of 1977 for the purpose or reclaiming and restoring land and water resources adversely affected by past coal mining. See 30 U.S.C. 1231(c). The AML Fund is financed by fees

2. The first full fiscal year of Combined Fund operations (termed a "plan year" under the Act) was scheduled to begin on October 1, 1993. See 26 U.S.C. 9702(c).[3] Congress directed that premium payments were to commence during the fiscal year beginning on that date. See 26 U.S.C. 9704(g)(1). In accordance with that time frame, the Coal Act provided that "the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator." 26 U.S.C. 9706(a).

For several reasons, however, the Commissioner was unable to complete the assignments of all beneficiaries before October 1, 1993.[4] First, the Coal Act itself did not authorize or appropriate any funds to carry out the assignment process, and the Social Security

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assessed on coal operators for each ton of coal produced. See 30 U.S.C. 1232(a).

[3] The Fund actually commenced operations on February 1, 1993. See 26 U.S.C. 9702(a), 9703(b)(4). Before October 1, 1993, benefits provided by the Fund were financed through other means, including interim contributions from signatories to the 1988 national coal wage agreement and a $70 million transfer from the 1950 UMWA Pension Plan. See 26 U.S.C. 9704(i)(1)(A), 9705(a).

[4] SSA was responsible for assigning about 80,000 retired miners who were receiving benefits under the predecessor multi-employer benefit plans. Members of the Bituminous Coal Operators' Association provided the agency with a list of coal operators who voluntarily acknowledged responsibility for about 15,000 of those retired miners. Thus, SSA was required to undertake a case-by-case evaluation of earnings records and employment history for about 65,000 individuals. See *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Ways and Means Comm.*, 103d Cong., 1st Sess. 24 (1993) (*1993 House Hearing*) (statement of Acting Commissioner Lawrence H. Thompson). We are informed that SSA completed approximately 55,300 of the remaining 65,000 assignments before October 1, 1993.

Administration (SSA) determined that it was not legally authorized to use Social Security trust funds for that purpose. Congress was therefore required to provide SSA with such authority in a supplemental appropriation act, which appropriated $10,000,000, "to remain available until expended," to enable SSA to make initial assignments, review assignments on requests for reconsideration, and calculate the initial health-benefit premium. That supplemental appropriations act was enacted on July 2, 1993, only three months before the date, October 1, 1993, on which the Combined Fund's operations were first financed through premiums from assigned operators. See Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, ch. V, 107 Stat. 254.[5]

Second, although the Coal Act required the predecessor multi-employer funds to provide SSA with the names and social security numbers of the retired miners who would be beneficiaries of the Combined Fund, those records were inadequate for completion of the assignment task. In many cases, those records did not contain sufficient information to allow SSA to identify the signatory operator that was the miner's employer, or to determine whether any particular related person could be assigned responsibility for a miner if the original operator was defunct. SSA reviewed

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[5] See also *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong., 2d Sess. 25 (1995) (*1995 House Hearing*) (statement of Deputy Commissioner Lawrence H. Thompson); Staff of the House Comm. on Ways and Means, 103d Cong., 2d Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 64-65 (Comm. Print 1993) (*Financing Orphan Benefits*); *1993 House Hearing* 23 (statement of Acting Commissioner Thompson).

records of thousands of corporate transactions obtained from far-flung and disparate sources to determine whether retired miners could be assigned to related persons of signatory operators. In addition, most of the social security employment records for the retired miners who were beneficiaries of the Combined Fund were not computerized and had to be searched manually.[6]

Finally, operators requested administrative review of SSA's assignments in thousands of cases. As of 1998, SSA had reviewed assignments for approximately 665 coal operators concerning 36,256 miners (out of a total of approximately 80,000 retired miners who were beneficiaries of the Combined Fund). That process of administrative review yielded new initial assignments, as SSA learned for the first time the proper identities of employers (or the related persons) of miners that were previously thought to be unassigned or had been assigned to the wrong operator.[7]

3. Several signatory operators that had received their initial assignments of miners on or after October 1, 1993, raised judicial challenges to those assignments. They contended that the Commissioner had no authority to make any such assignments on or after October 1, 1993. In *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (1999) (App. *infra*., 27a-50a), the Sixth Circuit agreed with those contentions. The

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[6] *1995 House Hearing* 24-25, 28-29; *Financing Orphan Benefits* 64-65.

[7] See *Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Oversight, Management, and Restructuring, and the District of Columbia of the Senate Governmental Affairs Comm.*, 105th Cong., 2d Sess. 60-61 (1998) (*1998 Senate Hearing*).

Sixth Circuit in turn relied on its decision in *Dixie Fuel* to invalidate the assignments made to respondents in these cases on or after October 1, 1993. See p. 15, *infra*.

The Sixth Circuit found it significant in *Dixie Fuel* that the Coal Act provided that the Commissioner "shall" make the assignments before October 1, 1993, and that "'shall' is explicitly mandatory language." *Dixie Fuel*, 171 F.3d at 1061 (internal quotation marks omitted); App., *infra*, 43a. The court acknowledged that Congress's use of the word "shall" to impose a duty on a government official to act by a certain date, "standing alone," is ordinarily insufficient to terminate the power of the government official to act beyond that date. See 171 F.3d. at 1062; App., *infra*, 44a. The court believed however, that the Coal Act's provisions governing the computation of unassigned-beneficiary premiums rest on the premise that all assignments of beneficiaries would have been made before October 1, 1993. In particular, it noted that each signatory operator's *pro rata* unassigned-beneficiary premium is determined by dividing the total number of beneficiaries assigned to that operator by the total number of beneficiaries assigned to all operators, "determined on the basis of assignments as of October 1, 1993." 26 U.S.C. 9704(f)(2); see *Dixie Fuel*, 171 F.3d at 1062; App., *infra*, 45a-47a. The court recognized that that quotient may be adjusted for following plan years, to reflect possible changes in assignments after October 1, 1993—if, for example, operators successfully challenge assignments as having been made to the wrong person. But, the court reasoned, "those adjustments are all premised on the assignments' having been completed before October 1, 1993." *Id.* at 1063; App., *infra*, 47a.

The government argued in *Dixie Fuel* that the court should defer, under *Chevron U.S.A. Inc.* v. *Natural*

Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984), to the Commissioner's determination that Congress's specification of the October 1, 1993, date by which assignments were to be made did not divest her of authority to make initial assignments after that date. See 171 F.3d at 1062-1064; App., *infra*, 48a-50a. The court rejected that argument, stating that "the statute is clear [and] the agency has nothing to interpret." 171 F.3d at 1064; App., *infra*, 50a.[8]

4. In the two decisions at issue in this case, the Sixth Circuit invalidated assignments made by the Commissioner after October 1, 1993, on the authority of its decision in *Dixie Fuel*. App., *infra*, 1a-2a, 3a-4a.

a. The respondents in *Peabody* allege that they were improperly assigned responsibility for 330 beneficiaries of the Combined Fund on or after October 1, 1993. Although SSA initially determined that those beneficiaries would have to be deemed unassigned because (it believed) the miners' employers were no longer in

[8] The government sought rehearing and rehearing en banc in *Dixie Fuel*. In the petition for rehearing, the government renewed its submission (which the panel had rejected, see 171 F.3d at 1056-1057; App., *infra*, 32a-33a) that the case was moot because the assignments to Dixie Fuel were invalid on another, independent basis: they could not be sustained in light of this Court's decision in *Eastern Enterprises* invalidating certain third-tier assignments on constitutional grounds. See p. 6, note 1, *supra*. Indeed, while *Dixie Fuel's* appeal from the district court's denial of preliminary injunctive relief was pending in the Sixth Circuit, the district court entered final judgment for *Dixie Fuel* on that independent ground, and the Commissioner argued to the court of appeals that the case was moot on that basis as well. See *University of Tex.* v. *Camenisch*, 451 U.S. 390, 393-394 (1981). Nonetheless, the Sixth Circuit denied rehearing. With the case in that posture, the Solicitor General did not seek review of the Sixth Circuit's decision in this Court.

business, the Commissioner subsequently obtained information showing that the miners had been employed by respondents or by a related company, and assigned those miners to Respondents. See *Peabody* C.A. App. 13-14, 24-26.

Respondents challenged those assignments in federal district court. They alleged, among other things, that the assignments were invalid under the Sixth Circuit's decision in *Dixie Fuel*.[9] The district court granted respondents partial summary judgment on that claim. App., *infra*, 7a-8a. It declared "that all initial assignments the Commissioner * * * made to [respondents] after September 30, 1993 are null and void," and enjoined the Commissioner from making similar initial assignments to respondents in the future. *Id.* at 7a (emphasis omitted).[10]

b. In *Bellaire*, respondents are a company (Bellaire) that has been assigned responsibility for beneficiaries

[9] In *Dixie Fuel*, the Sixth Circuit held that the assigned operators could seek judicial review of the Commissioner's assignment determinations without exhausting the administrative remedies set forth in 26 U.S.C. 9706(f). 171 F.3d at 1059; App., *infra*, 36a-39a. Respondents in *Peabody* likewise filed suit directly in district court without seeking administrative review of the Commissioner's initial decision, and so there is no administrative review decision in the record explaining in detail the basis of the Commissioner's assignment determinations. The Commissioner did not argue below that respondents were required to exhaust their administrative remedies before maintaining this action.

[10] The *Peabody* respondents' complaint set forth additional counts challenging the assignments on other grounds, but those other claims were all dismissed pursuant to a stipulation and by a separate order of the court. See App., *infra*, 9a-13a. After all the claims raised in the complaint were resolved, the district court entered a separate final judgment for the *Peabody* respondents pursuant to Federal Rule of Civil Procedure 58. App., *infra*, 5a.

of the Combined Fund, and its corporate affiliates. They filed suit against the Commissioner in federal district court, challenging the application of the statute on several grounds. They alleged that the Commissioner had made 270 initial assignments of beneficiaries to Bellaire after September 30, 1993, in violation of 26 U.S.C. 9706(a) of the Coal Act as construed by the Sixth Circuit in *Dixie Fuel*. See *Bellaire* C.A. App. 24-26, 82-84.[11]

The district court granted partial summary judgment for respondents. App., *infra*, 12a-13a. It concluded that the challenged assignments are indistinguishable from those invalidated in the *Dixie Fuel* case and are therefore void as a matter of law. *Id.* at 20a-21a. It also held that the Combined Fund (the Trustees of which intervened as defendants, and are respondents here) was required to credit prior payments made by respondents to the Combined Fund for those beneficiaries against

[11] Like the respondents in *Peabody*, respondents in *Bellaire* did not, at the time the assignments were made, seek reconsideration of the assignments through the administrative remedies set forth in the Coal Act. After *Dixie Fuel* was decided, the *Bellaire* respondents asked the Commissioner to withdraw several allegedly untimely assignments, in light of the Sixth Circuit's decision. The Commissioner denied that request. The Commissioner explained that the agency had decided to withdraw assignments on the basis of the *Dixie Fuel* decision only if the signatory operator resided within the Sixth Circuit and was challenging an assignment made after *Dixie Fuel* was decided. See *Bellaire* C.A. App. 216-217. The Department of Justice and the Commissioner had determined, after consultation in light of the *Dixie Fuel* decision, the mootness of the *Dixie Fuel* case itself, and the Solicitor General's decision not to file a certiorari petition in *Dixie Fuel* (see p. 12, note 8, *supra*), that the government would examine avenues of securing further review of the issue within the Sixth Circuit or in this Court, if possible.

their future obligations for other beneficiaries. *Id.* at 21a. The court then directed entry of final judgment on those claims under Federal Rule of Civil Procedure 54(b). App., *infra*, 12a-13a, 22a-24a.

c. The Commissioner appealed to the Sixth Circuit in each case, and also petitioned for initial hearing en banc for the purpose of seeking reconsideration of *Dixie Fuel*. The court of appeals denied those petitions. App., *infra*, 26a. The court then issued brief *per curiam* opinions affirming the district court's judgment in each case, explaining that the panel was bound to follow the circuit precedent in *Dixie Fuel*. *Id.* at 1a-2a, 3a-4a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has held that, under the Coal Act, the Commissioner of Social Security had no authority to make any initial assignments of retired miners to signatory operators on or after October 1, 1993, and on that basis it invalidated the assignments of the miners at issue in these two cases. That court's reading of the Coal Act is incorrect. It conflicts directly with the recent decision of the Fourth Circuit in *Holland* v. *Pardee Coal Co.*, No. 00-1770, 2001 WL 1244840 (Oct. 18, 2001), which upheld the Commissioner's authority to make such assignments. The court of appeals' construction of the Coal Act, if allowed to stand, could lead to a significant disruption of the statutory funding scheme established by Congress to protect the health-care benefits of tens of thousands of retired coal miners and their dependents. This Court's review is therefore warranted.

1. The Sixth Circuit erred in ruling that Section 9706(a)'s provision that initial assignments were to be made before October 1, 1993, divested the Commissioner of authority to make any such assignments on or

after that date. This Court long ago made clear that "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them * * * do not limit their power or render its exercise in disregard of the requisitions ineffectual." *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872). With specific regard to statutory provisions directing federal agencies to take action by or within a given time, the Court has stressed that it is "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially where important public rights are at stake." *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986). Accordingly, the Court has held that, "if a statute does not specify a consequence for [agency] noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993); see also *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-718 (1990).

Nothing in the Coal Act suggests that the Commissioner's assignment authority terminated on October 1, 1993. Congress could easily have provided that, if assignments were not completed by October 1, 1993, the Commissioner should have no further authority to assign a beneficiary to a signatory operator or related person, and that any untimely assignments would be deemed invalid. Congress has, in fact, specifically provided in various statutes that an agency's authority to act terminates upon expiration of a certain period.[12]

[12] See, *e.g.*, 42 U.S.C. 1396n(h) (1994 & Supp. V 1999) (application for waiver of Medicaid requirements must be deemed approved if Secretary of Health and Human Services does not issue a decision within 90 days); 25 U.S.C. 2710(e) (proposed tribal gaming ordinance must be deemed approved if agency fails to disapprove ordinance within 90 days); 25 U.S.C. 2710(d)(8)(C) (proposed state-tribal compact must be deemed approved if Secretary of the Interior fails to disapprove compact within 45 days); 49 U.S.C. 15901(c) (Surface Transportation Board investigative proceeding automatically dismissed if not completed within three years); see also 18 U.S.C. 3161 *et seq.* (Speedy Trial Act).

The Coal Act, however, contains no such provision. That omission is itself highly significant, for Congress enacted the Coal Act against the background of this Court's precedents, including *Pierce County* and *Montalvo-Murillo*, making clear that a statutory requirement that an agency take action by or within a certain time does not, by itself, divest the agency of authority or jurisdiction to act beyond that time. Congress is presumed to have been aware that, under those decisions, a statutory provision that an agency "shall" take action by a certain date will not, without more, be construed to terminate an agency's authority after that date. See *United States* v. *Wells*, 519 U.S. 482, 495 (1997).

Nor does the Coal Act manifest any congressional intent to impose a "consequence" upon the Commissioner if she failed to make assignments as of October 1, 1993. In the first place, unlike other cases (such as *Pierce County*, *Montalvo-Murillo*, and *James Daniel Good*), where it was argued (unsuccessfully) that Congress wanted the agency to lose the authority to enforce a statutory provision as a punishment for missing deadlines, no such consequence could be visited upon SSA, which does not itself "enforce" the Coal Act in that sense, and does not pay benefits to retirees and their dependents under the Act. SSA's functions are limited to assigning beneficiaries to operators and calculating the per-beneficiary premium that those

operators must pay to the Combined Fund. See 26 U.S.C. 9704, 9706. The Combined Fund, not SSA, then pays for the health care of beneficiaries and pursues actions against assigned operators that do not pay their premiums. SSA's assignments thus take place under a statutory framework that establishes relationships among *private* parties to provide for the funding of health-care benefits.

In addition, if the Sixth Circuit's decisions are is allowed to stand, the loss of premiums to the Combined Fund from operators that were assigned beneficiaries on or after October 1, 1993, will in turn have adverse consequences on the Department of the Interior's AML Fund and on other, private parties, not on SSA. Under the *Dixie Fuel* decision, retired miners who were initially assigned to a signatory operator after that date are likely to be deemed unassigned, and the cost of financing their benefits will be shifted to transfers from the AML Fund or, if such funds are not available, onto a further *pro rata* contribution from all coal operators who have been assigned beneficiaries. See p. 7, *supra*. No precedent of which we are aware supports visiting the consequences of an agency's failure to meet a time requirement onto other, innocent entities in such a fashion.

The Sixth Circuit's reading thus frustrates Congress's objective, expressed in the Coal Act itself, of ensuring that the costs of providing health-care benefits are, to the extent possible, borne by the "persons most responsible for plan liabilities." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037. The "overriding purpose" of the assignment provisions of the Coal Act was "to find and designate a specific obligor for as many beneficiaries in the Plans as possible." 138 Cong. Rec. 34,002 (1992) (explanation by

Sen. Wallop). In erecting the three-tier assignment structure in Section 9706(a), Congress manifested its intent that miners should be deemed unassigned only as a last resort, when no employer (or related person) falling within the statutory criteria could be identified. The Sixth Circuit's reading directly undermines that purpose by shifting the obligation for a retired miner's benefits away from the operator that employed the miner (or a related person) to the unassigned pool, even when the actual employer's responsibility for that miner under the Coal Act is patently clear.

The notion that Congress intended to impose an absolute cut-off point for all assignment determinations is particularly inconsistent with Congress's decision to impose funding responsibilities, not just on original signatories of collective bargaining agreements promising benefits, but also on a wide range of related business entities. See 26 U.S.C. 9701(c)(2), 9706(a). To comply with that aspect of the statutory scheme, SSA was required to trace many complex changes in business ownership and control as it sought to identify the entity responsible for a miner's benefits. See pp. 9-10, *supra*. Information about such changes in corporate ownership and control was not available from any single, central repository, but was pieced together from information obtained from the Combined Fund, other signatory operators, retired miners, and public records. It is scarcely conceivable that Congress would have imposed an absolute "jurisdictional" bar on the ability of the Commissioner to complete that undertaking when, in a significant number of cases, decisions depended on information that was not within the Commissioner's possession when the Coal Act was passed.

Indeed, in part because the task of assigning miners was so complicated, Congress provided SSA with a

supplemental appropriation of $10 million to carry out that task. That appropriation law was enacted only three months before October 1, 1993—the date the court of appeals held to be an absolute cut-off point for all initial assignments—at a time when Congress knew that the initial assignment process had not even *begun*, because SSA had determined that it could not use the Social Security trust fund for Coal Act purposes. See pp. 8-9, *supra*. In those circumstances, it is not surprising that Congress expressly provided that the supplemental appropriation would not expire at the end of the fiscal year, but would remain available "until expended." See p. 9, *supra*.[13]

The Sixth Circuit believed that an intent on the part of Congress that all initial assignment decisions must be made before October 1, 1993, or not at all, was reflected in the fact that, under 26 U.S.C. 9704(f)(1), assigned operators' potential exposure to *pro rata* contribution liability for unassigned beneficiaries is fixed according to their proportionate share of all assigned beneficiaries as of that date. See *Dixie Fuel*, 171 F.3d at 1062-1063; App., *infra*, 46a-47a. But as the Sixth Circuit also noted, the Coal Act provides that that proportionate share may be adjusted in following years, to take account of changed circumstances, such as the possibility that assigned operators might go out of business and their beneficiaries might have to be deemed unassigned. See *Dixie Fuel*, 171 F.3d at 1063; App., *infra*, 47a; 26 U.S.C. 9704(f)(2)(B). In addition, if the Commissioner determines, upon administrative review of an assignment decision, that the initial assignment was incorrect, he may reassign the beneficiary to another signatory operator (if such is available), and each operator's proportionate share may be adjusted to reflect such reassignments as well. See *Dixie Fuel*, 171 F.3d at 1063; App., *infra*, 47a; 26 U.S.C. 9704(f)(2)(A), 9706(f); pp. 6-7, *supra*. Thus, each assigned operator's proportionate share of unassigned-beneficiary liability, while determined as of October 1, 1993, is not fixed in concrete, but instead must be adjusted to reflect changed circumstances. There is no reason why there should be a unique bar to making any initial assignments after that date.

Finally, to the extent that the Coal Act is ambiguous on the question, the Commissioner's construction is entitled to deference. The Commissioner's conclusion that she retains assignment powers after October 1, 1993, is certainly not contradicted by anything in the statutory text; it furthers the Coal Act's objectives; and it is consistent with background principles set forth in decisions of this Court. That conclusion also reflects the Commissioner's practical experience in carrying out the enormously complex assignment tasks under the Coal Act—namely, that the function simply could not be completed, in the manner that the Act contemplated, before October 1, 1993. The Commissioner's reading of the Act therefore should be sustained. See *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171-2174 (2001); *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

2. The decisions below, and the *Dixie Fuel* decision on which they rest, are in direct conflict with the Fourth Circuit's decision in *Holland* v. *Pardee Coal*

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[13] See General Accounting Office, *Principles of Federal Appropriations Law* 5-6 (1991) (explaining that the phrase "until expended" is used in appropriation acts to make clear that "all statutory time limits as to whether the funds may be obligated and expended are removed").

Co., No. 00-1770, 2001 WL 1244840 (Oct. 18, 2001).[14] Whereas the Sixth Circuit held in *Dixie Fuel* that Section 9706(a) extinguished the Commissioner's power to make assignment determinations as of October 1, 1993, 171 F.3d at 1064, the Fourth Circuit in *Pardee* expressly rejected the Sixth Circuit's decision and arrived at the "opposite conclusion," namely, that the Coal Act "clearly allows the SSA to exercise its assignment authority, including the authority to make new assignments, after October 1, 1993." *Pardee*, 2001 WL 1244840, at *4 (footnote omitted).

In *Pardee*, the Fourth Circuit rejected all of the Sixth Circuit's rationales for its decision in *Dixie Fuel*. First, the Fourth Circuit concluded that the text of the Coal Act gives no indication that Congress divested the agency of authority to make assignments after October 1, 1993. Although the court noted that the Coal Act provides that the Commissioner "shall" make assignments by that date, it observed that, under this Court's decisions in cases such as *Pierce County*, *Montalvo-Murillo*, and *James Daniel Good*, Congress's use of the word "shall" to direct an agency to take an action by or within a particular period, by itself, "is insufficient textual evidence to establish that Congress intended such a provision to be jurisdictional." 2001 WL 1244840, at *6. Second, the Fourth Circuit disagreed with the Sixth Circuit's reasoning that, under Section 9704(f), assigned operators' share of potential *pro rata* liability must be definitively fixed as of October 1, 1993. The court noted, rather, that "the number of unassigned beneficiaries has been changed on numerous occasions throughout the history of the Combined

[14] On November 14, 2001, the Fourth Circuit denied a petition for rehearing and rehearing en banc in *Pardee*.

Fund, and the statute expressly contemplates that possibility." *Id.* at *7 (internal citation omitted).

The *Pardee* court also explained that the Coal Act in general "subordinate[s] the coal operators' interest, if any, in finalizing assignments by October 1, 1993, to the overriding interest in ensuring that such assignments are fair and accurate." 2001 WL 1244840, at *7. It therefore stressed that terminating the Commissioner's assignment power as of October 1, 1993, would be inconsistent with the Coal Act's "overriding purpose" of placing responsibility for a miner's benefits on the operator that had actually employed that miner (or on some related person to that operator), rather than placing miners in the unassigned-beneficiary pool. *Id.* at *8. Noting also that "[t]he funding implications of [the view it rejected] are significant," the court observed that, if certain operators could "avoid liability for individual beneficiaries—and thus enjoy a proportionate reduction in their contributions for unassigned beneficiaries—simply because some assignments were 'untimely[,]'" they would obtain a "financial windfall * * * at the expense of other operators * * * and, more importantly, the public interest." *Id.* at *9.

The conflict between the Fourth and Sixth Circuits is particularly deserving of this Court's review because this issue disproportionately affects coal operators located in those circuits, where much of the extractive bituminous coal mining operations governed by the national coal wage agreements that led to the adoption of the Coal Act were carried out. We have been informed by SSA that 390 companies were assigned responsibility for miners on or after October 1, 1993. Of those companies, 211, or more than half, are located in the Fourth and Sixth Circuits: 155 in the Fourth Circuit, and 56 in the Sixth Circuit. Thus, the conflict-

ing court of appeals decisions already govern more than half of the cases that might be brought concerning this issue.[15]

3. This Court's review is also warranted because the Sixth Circuit's construction of the Coal Act in *Dixie Fuel* threatens to erode the financial stability of the Combined Fund and, ultimately, the efficaciousness of the Coal Act. The Commissioner's authority to assign beneficiaries on or after October 1, 1993, has been important to the attainment of Congress's express objective of creating a stable, privately-financed benefit plan paid for by the businesses that Congress deemed most responsible for the health-care benefits of retired coal miners and their dependents. If the Commissioner is now held to have lacked the authority to make any assignments on or after October 1, 1993, a large number of miners will become "orphaned" once again. Responsibility for their benefits will then be shifted to the public and to other mine operators, in contravention of Congress's intent that those methods of financing are a last resort. See pp. 4-7, *supra*.

The validity of assignments made on or after October 1, 1993, affects a significant proportion of Coal Act assignments, and thus threatens to have a significant impact on the funding of benefits under the Act. We have been informed by SSA that, of the approximately 80,000 retired miners who were eligible to receive benefits from the Combined Fund when the Coal Act was passed, approximately 7500 miners were initially

[15] In addition, the same issue, along with other issues, is currently pending before the Third Circuit in *Shenango, Inc.* v. *Barnhart*, No. 00-2525 (argued Sept. 19, 2001); 97 companies located in the Third Circuit were assigned miners on or after October 1, 1993.

assigned by SSA to a signatory operator or a related person on or after October 1, 1993.[16] Moreover, the issue presented here affects the funding for the health care of an even larger number of *beneficiaries*, because responsibility to the Combined Fund for the benefits of miners' eligible spouses and dependents is contingent on the assignment of the related miner. The issue presented thus potentially affects the funding for the benefits of more than 10,000 of the approximately 114,000 beneficiaries who were eligible to receive benefits from the Combined Fund at the time the Act was passed.[17]

The wholesale invalidation of beneficiary assignments made on or after October 1, 1993, would significantly reduce the Combined Fund's revenues from assigned-beneficiary premiums. The General Account-

[16] Approximately 2100 more miners were determined by SSA to be unassigned on or after October 1, 1993.

[17] SSA has information only on assignments of retired miners, not spouses and dependents, because SSA was not made responsible under the Coal Act for determining the identities of spouses and dependents of retired miners who are eligible for benefits under the Fund. It is known, however, that SSA made approximately 80,000 assignments of retired miners under the Coal Act, and that at its inception the Combined Fund had approximately 114,000 beneficiaries. See *Financing Orphan Benefits* 22. Thus, on average, each *miner* assignment likely accounts for approximately 1.4 *beneficiary* assignments under the statute.

Some beneficiaries of the Combined Fund have died since the inception of the Fund, but the issue presented in this case nonetheless at least potentially affects the financing for the health-care benefits that the Fund provided them before their death. Signatory operators may demand that the Fund refund them the premiums that they paid in previous years for beneficiaries who were assigned after October 1, 1993, or credit that amount against premium amounts that they must pay in future years for other beneficiaries.

ing Office has estimated that invalidation of such assignments on a nationwide basis could require the Combined Fund to make net refunds of $57 million in premium revenues collected for prior fiscal years. See General Accounting Office, *Analysis of the Administration's Proposal to Ensure Solvency of the United Mine Workers of America Combined Benefit Fund* 7 (Aug. 15, 2000) (*GAO Analysis*).[18] The Combined Fund would also lose substantial assigned-beneficiary premium revenues in future fiscal years.[19]

The Combined Fund would, of course, have to look elsewhere to recover those lost revenues.[20] Presum-

[18] In a declaration filed in the *Pardee* litigation, the Combined Fund projected that implementation of *Dixie Fuel* would require a refund of $105 million in previously collected premiums, and that those refunds would be partially offset by the levy of an additional *unassigned* beneficiary premium on remaining signatory operators of approximately $48 million—thus leaving, as the GAO stated, a "net" premium refund of $57 million for prior fiscal years. The Combined Fund also estimates that an additional transfer from the AML Fund of between $60-80 million would be required to cover the increased unassigned-beneficiary liability for prior fiscal years through September 30, 1999. See C.A. App. 46, *Holland* v. *Pardee Coal Co.*, No. 00-1770 (4th Cir. Oct. 18, 2001).

[19] The yearly revenue loss decreases with each succeeding fiscal year because of mortality in the pertinent beneficiary population. Nonetheless, our understanding is that, even assuming that only 4000 retired miners whose assignments were made after October 1, 1993, survive—or less than half the number of retired miners whose assignments were initially made after October 1, 1993—the Combined Fund would still lose more than $10 million per year in revenue from assigned-beneficiary premiums if assignments made after October 1, 1993, are deemed invalid. That understanding is based on the fact that the assigned-beneficiary premium in effect for Fiscal Year 2001 is about $2700 for each individual.

[20] Even without the loss of assigned-beneficiary premium revenues resulting from the *Dixie Fuel* decision, the Combined Fund

ably, the Fund would look first to interest earned on the AML Fund; if that source proved insufficient to cover the costs of providing benefits, the Fund would then be required to impose an unassigned beneficiary premium on all assigned operators. See p. 7, *supra*. But those alternative sources of revenue are not inexhaustible. The recent steep decline in interest rates may reduce the amount of interest that may be earned on the AML Fund in future years, and in any event the AML Fund is principally intended to rectify the serious

faces serious financial difficulties. In August 2000, the GAO reported that, for Fiscal Years 2002 through 2008, the Combined Fund was projected to experience operating shortfalls of $58 million or more in each year. *GAO Analysis* 26. The GAO concluded that those financial difficulties resulted from several causes, including rising health-care costs and a financing mechanism that had been adversely affected by court decisions, including this Court's decision in *Eastern Enterprises* and the Sixth Circuit's *Dixie Fuel* decision. *Id.* at 1-2, 22-25.

Congress has twice enacted supplemental appropriations to bolster the Combined Fund's financial condition. In November 1999, Congress authorized an additional $68 million transfer from the AML Fund, over and above the transfers authorized by the Coal Act, to cover any shortfall in the Fund's premium accounts. Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 501, 113 Stat. 1501A-214. In October 2000, Congress authorized another transfer from the AML Fund, "in such amounts as estimated by the trustees of such [Combined Benefit] Fund to offset the amount of any deficit in net assets in the Combined Fund through August 31, 2001." Department of the Interior and Related Agencies Appropriations Act, 2001, Pub L. No. 106-291, § 701(a)(1), 114 Stat. 1024. Those additional appropriations address the Fund's operating deficit in prior years (aside from the possibility that further assignments made on or after October 1, 1993, might be invalidated), but they do not remedy the substantial operating deficits the Combined Fund has been projected to incur in Fiscal Year 2002 and beyond.

threat to public health and safety posed by abandoned coal mines. Furthermore, some assigned operators might cease coal mining operations and go out of business entirely rather than shoulder the increased costs associated with their unassigned-beneficiary premiums. Thus, the *Dixie Fuel* decision portends a possible return to the same downward spiral of increasing costs and fewer payers that led Congress to enact the Coal Act.

Congress devised the Combined Fund's premium-based financing mechanism to avoid that prospect. Congress intended that responsibility for retired miners' health-care costs would rest with businesses that Congress deemed most responsible for the benefits promised to miners and their dependents. The decisions below, however, and the *Dixie Fuel* holding on which they rely, undermine Congress's intent to create a stable, privately-financed system for financing health care benefits. For that reason, and because the decisions below and in *Dixie fuel* squarely conflict with the Fourth Circuit's decision in *Holland* v. *Pardee Coal Co.*, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should granted.

Respectfully submitted.

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NOVEMBER 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-6239

PEABODY COAL COMPANY; EASTERN ASSOCIATED COAL CORPORATION, PLAINTIFFS-APPELLEES

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, DEFENDANT-APPELLANT

On Appeal from the United States District Court for the Western District of Kentucky

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Filed: June 21, 2001

MEMORANDUM OPINION

Before: MARTIN, Chief Judge; NORRIS, Circuit Judge; and QUIST, District Judge.*

PER CURIAM. The sole issue presented to us upon appeal is whether the Commissioner of Social Security had authority under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* ("Coal Act"), to make initial assignments of beneficiaries to coal operators after October 1, 1993. This court has

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* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

already held that the Commissioner lacks such authority. *See Dixie Fuel Co.* v. *Comm'r of Soc. Sec.*, 171 F.3d 1052 (6th Cir. 1999).

Recognizing that *Dixie Fuel* controls our disposition of this case, the government concedes that this panel must affirm the district court's decision to declare all initial assignments made after October 1, 1993, null and void. We agree. "[A] subsequent panel of this circuit court is powerless to revisit, modify, amend, abrogate, supersede, set aside, vacate, avoid, nullify, rescind, overrule, or reverse any prior Sixth Circuit panel's published precedential ruling of law." *United States* v. *Dunlap*, 209 F.3d 472, 481 (6th Cir. 2000); *see also* 6th Cir. R. 206(c) ("Court en banc consideration is required to overrule a published opinion of the court."). Our decision in *Dixie Fuel* thus controls until and unless "an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *United States* v. *Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (quoting *Salmi* v. *Sec'y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

We therefore **affirm** the district court's grant of summary judgment to the plaintiffs on the basis of our prior opinion in *Dixie Fuel.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-4080 and 00-4082

BELLAIRE CORPORATION; NACCO INDUSTRIES, INC.; NORTH AMERICAN COAL CORPORATION,
PLAINTIFFS-APPELLEES

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, DEFENDANT-APPELLANT

MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O.S. RAND; ELLIOT A. SEGAL; CARL E. VAN HORN; GAIL R. WILENSKY, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, INTERVENING DEFENDANTS

On Appeal from the United States District Court for the Southern District of Ohio

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Filed: June 22, 2001

MEMORANDUM OPINION

Before: MARTIN, Chief Judge; NORRIS, Circuit Judge; and QUIST, District Judge.*

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* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

PER CURIAM. The sole issue before us upon appeal is whether the Commissioner of Social Security had authority under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* ("Coal Act"), to make initial assignments of beneficiaries to coal operators after October 1, 1993. This court has already held that the Commissioner lacks such authority. *See Dixie Fuel Co.* v. *Comm'r of Soc. Sec.*, 171 F.3d 1052 (6th Cir. 1999).

Recognizing that *Dixie Fuel* controls our disposition of this case, the government explicitly (and the trustees implicitly) concedes that this panel must affirm the district court's decision to declare all initial assignments made after October 1, 1993, null and void. We agree. "[A] subsequent panel of this circuit court is powerless to revisit, modify, amend, abrogate, supersede, set aside, vacate, avoid, nullify, rescind, overrule, or reverse any prior Sixth Circuit panel's published precedential ruling of law." *United States* v. *Dunlap*, 209 F.3d 472, 481 (6th Cir. 2000); *see also* 6th Cir. R. 206(c) ("Court en banc consideration is required to overrule a published opinion of the court."). Our decision in *Dixie Fuel* thus controls until and unless "an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *United States* v. *Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (quoting *Salmi* v. *Sec'y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

We therefore **affirm** the district court's grant of partial summary judgment to the plaintiffs on the basis of our prior opinion in *Dixie Fuel*.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

Civil Action No. 4:99CV-201-M

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANTS

[Entered: July 11, 2000]

FINAL JUDGMENT

The Defendant's Motion for Entry of Judgment pursuant to Rule 58 is hereby granted. [DN 19] Therefore, a final judgment is hereby entered consistent with the terms of the Orders previously entered herein on February 8, 2000 [DN8], March 14, 2000 [DN 15], and April 13, 2000 [DN 18], which Orders dispose of all the issues in this case.

THIS IS A FINAL AND APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

This 11th day of July, 2000.

/s/ JOSEPH H. MCKINLEY, JR.
JOSEPH H. MCKINLEY, JR.
Judge, United States District Court

cc: counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 4:99CV-201-M

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER SOCIAL SECURITY ADMINISTRATION, DEFENDANT

[Entered: Apr. 13, 2000]

ORDER

Plaintiffs' filing of the Complaint having caused Social Security Administration to expend considerable resources in investigating the factual bases of Count VI and in responding to the claims in Count VI, and this Court finding that dismissal would prejudice the defendant,

IT IS ORDERED that Plaintiffs motion to dismiss Count VI without prejudice is denied and that Count VI is hereby dismissed WITH PREJUDICE.

Date: 4/13/2000

/s/ JOSEPH H. MCKINLEY
JOSEPH H. MCKINLEY,
United States District Court
Judge

cc: counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 4:99CV-201(M)

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Entered: Mar. 14, 2000]

ORDER

Upon consideration of the Plaintiffs' Motion for Partial Summary Judgement on Counts IV and V, and Defendant's opposition thereto, and the entire record in this matter, it is hereby ORDERED that the Plaintiffs' Motion for Partial Summary Judgment is GRANTED and DECLARED that all *initial* assignments the Commissioner of Social Security made to Peabody Coal Company and Eastern Associated Coal Corp. after September 30, 1993 are null and void.

It is further ORDERED that the Commissioner is enjoined from making any *initial* assignments to Peabody Coal Company and Eastern Associated Coal Corp. in the future; and ORDERED that the Commissioner shall notify the UMWA Combined Benefit Fund within 45 days of the entry of this Order of the identity of each beneficiary assignment to Peabody Coal Com-

pany and Eastern Associated Coal Corp. from the Social Security Administration subject to this Order, and inform the Combined Fund that said assignments are void and have been withdrawn.

Dated: 3-14-2000 /s/ JOSEPH S. MCKINLEY
JOSEPH S. MCKINLEY
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

C.A. #4:99CV-201(M)

PEABODY COAL COMPANY, ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER SOCIAL SECURITY,
DEFENDANT

[Filed: Feb. 8, 2000]

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, it is hereby stipulated and agreed to by and between the respective parties that Counts I - III of Plaintiffs' Complaint in the above-captioned case be dismissed without prejudice, each party to bear their own costs, and that the Court may enter an Order accordingly, notice by the Clerk being hereby waived.

So stipulated.

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ORDER

AND NOW, to wit, this 8th day of February 2000, it is so ORDERED.

/s/ JOSEPH H. MCKINLEY
JOSEPH H. MCKINLEY
UNITED STATES
DISTRICT JUDGE

cc: Counsel of Record

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Case No. C2-99-532

BELLAIRE CORP., ET AL.

vs.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL.

[Filed: June 30, 2000]

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Opinion and Order of June 30, 2000, the Bellaire Group's motions for partial summary judgment are GRANTED as they relate to the 270 beneficiaries named in Count IV of the Complaint. The Court ORDERS the Trustees to credit the accounts of the Bellaire Group for the payments previously made for the 270 beneficiaries at issue in Count IV of the

Complaint. The Court further finds that the Bellaire Group is entitled to injunctive relief as set forth in the Opinion and Order. FINAL JUDGMENT is therefore entered with respect to Count IV of the Complaints in favor of the Bellaire Group.

Date: June 30, 2000 Kenneth J. Murphy, Clerk

/s/ PEG LAMBERT
By PEG LAMBERT/Deputy Clerk

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-99-532

BELLAIRE CORP., ET AL., PLAINTIFFS

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL., DEFENDANTS

[Filed: June 30, 2000]

OPINION AND ORDER

This matter is before the Court on the motions for preliminary and permanent injunctive relief, partial summary judgment and the entry of final judgment filed by Plaintiffs Bellaire Corp., NACCO Industries, Inc. and The North American Coal Corp., (the "Bellaire Group"). (Doc. # 14; Doc. # 18.) For the reasons stated below, the Court GRANTS the Bellaire Group's motions.

I. BACKGROUD

The facts of this case are not in dispute. On June 4, 1999, the Bellaire Group filed the instant action against Defendant Kenneth S. Apfel, Commissioner of Social Security. On November 8, 1999, the Trustees of the United Mine Workers of America ("UMWA") Combined Benefit Fund (the "Trustees") filed a motion to intervene in this action as party defendants. (Doc. # 8.)

On April 7, 2000, the Court granted the Trustees' motion to intervene. (Doc. # 15).

In its six-count Complaint, the Bellaire Group seeks review of several final administrative decisions made by the Commissioner which imposed health benefit liability on the Bellaire Group under the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. § 9701 (1992). The instant motions concern only Count IV of the Complaint. In Count IV, the Bellaire Group seeks review of the Commissioner's decision to hold it responsible under the Coal Act for paying the health insurance premiums for certain retired miners and their dependants. In order to better understand the basis for Count IV of the Complaint, the Court now examines the relevant provisions of the Coal Act.

A. The Coal Act

In 1992, Congress enacted the Coal Act in order to create additional financing for the health benefits of retired miners and their dependants. The Act created the UMWA Combined Benefit Fund and made individual mine operators responsible for the health care costs of specific assigned beneficiaries. To that end, the Act directed the Commissioner of Social Security to assign retired miners to the signatory operator or the "related person" who had previously employed them.[1] That operator then became responsible for paying the

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[1] A "signatory operator" is a coal company that signed any previous coal wage agreement. *See* 26 U.S.C. § 9701(c)(1). A "related person" is a member of a controlled group of corporations that includes the signatory operator, any business under common corporate control with the signatory operator or any other person having a partnership interest with the signatory operator in a coal related business. *See id.* at § 9701(c)(2)(A).

health benefit premiums of those assigned retirees and their dependants. The Act provided that the Commissioner "shall" make the assignments by October 1, 1993. The Act further provided that the health benefit premiums for beneficiaries not assigned to specific operators shall be allocated throughout the coal industry. That is, each operator would be responsible for paying a certain percentage of the health care costs of beneficiaries who were not specifically assigned to an operator.

B. The Instant Dispute

In Count IV of the Complaint, the Bellaire Group asserts that the Coal Act set a statutory deadline of October 1, 1993, after which time the Commissioner could not assign new beneficiaries to the companies. The Bellaire Group asserts that they were wrongfully assigned 270 beneficiaries by Defendants after this deadline.[2] The Bellaire Group argues that they cannot be compelled to pay the premiums for those beneficiaries who were not initially assigned to some signatory operator or related person by the October 1, 1993 deadline.

On April 5, 2000, the Bellaire Group filed the instant motions for a preliminary and permanent injunction,

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[2] The Bellaire Group originally asserted that the Commissioner wrongfully assigned 273 beneficiaries to them. However, three of those beneficiaries were actually assigned before the October 1, 1993 deadline. Because those three beneficiaries were assigned before the deadline, the parties agreed to dismiss the portion of Count IV that pertains to those beneficiaries. Specifically, the parties agreed to dismiss, with prejudice, the portion of Count IV that pertains to Wallace Gordon, Leland Thomas and Clara Thomas. (Doc. # 23.)

partial summary judgment and the entry of final judgment with respect to Count IV of the Complaint against the Commissioner. (Doc. # 14.) After that motion was filed, this Court granted the Trustees leave to intervene as a party defendant in this action. (Doc. # 15.) The Bellaire Group then filed an identical motion against the Trustees that merely incorporates the law and argument from the first motion. (Doc. # 18.) The Court now considers those motions together.

II. THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

A. The Standard of Review

Summary judgment is appropriate only in a limited number of circumstances. Rule 56(c) of the Federal Rules of Civil Procedures provides, in pertinent part, that summary judgment shall be granted only:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing the absence of a genuine issue as to any material fact. *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The Supreme Court held that the standard of summary judgment "mirrors the standard for a directed verdict under Federal Rules of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250

(1986). This is true where, for instance, the dispute turns only on a legal question and the moving party must prevail as a matter of law even if the court were to resolve all factual disputes in favor of the non-moving party. *See Ross* v. *Franzen*, 777 F.2d 1216, 1222 (7th Cir. 1985).

In addition, a summary judgment motion requires special treatment of the record. The Court "must view the evidence presented through the prism of the substantive evidentiary burden" and determine "whether reasonable jurors could find by a preponderance of the evidence that the Plaintiff is entitled to a verdict . . . ." *Anderson*, 477 U.S. at 252; *see also Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). Nonetheless, in making this determination the Court may not impinge upon the proper function of the jury. Therefore, all of "[t]he evidence of the non-movant is party to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. The non-moving party does have the burden, however, after completion of sufficient discovery, to submit evidence in support of any material element of a claim or defense on which that party would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. *See Celotex Corp.*, 477 U.S. at 322. It is with these standards in mind that the instant motions for partial summary judgment must be decided.

B. Analysis

Count IV of the Complaint alleges that the Commissioner unlawfully assigned beneficiaries to the Bellaire Group who were not originally assigned to some signatory operator, whether a member of the Bellaire Group or some other entity, after the October 1, 1993 deadline. According to the Bellaire Group, it is paying over $40,000 each month in preminums, and has alread paid over a total of $4.3 million, as a result of the illegal assignments.

In support of its position, the Bellaire Group relies on *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 P.3d 1052 (6th Cir. 1999). In *Dixie Fuel*, the Sixth Circuit addressed the precise issue raised in this case: whether the Commissioner of Social Security has the authority to make original assignments of Coal Act beneficiaries on or after the October 1, 1993 deadline. In resolving this issue, the Sixth Circuit held that the Commissioner cannot make such assignments. *Id.* at 1064. Specifically, the Sixth Circuit held that "[t]he October 1, 1993 date is a deadline" and the Coal Act "does not permit the SSA to make such assignments after that date." *Id.*

In reaching this decision, the Sixth Circuit began its analysis with the statutory language of § 9706(a) of the Coal Act which provides, in pertinent part:

> [T]he Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator. . . .

Id. at 1060 (quoting 26 U.S.C. § 9706(a) (1992)). The Sixth Circuit found the language of this provision to be

"plain on its face" and that the word "shall" is "explicitly mandatory language." *Id.* at 1061. Furthermore, the Sixth Circuit noted as follows:

> No provision of the Coal Act so much as hint that the October 1, 1993 date is not a deadline. To the contrary, the entire statutory scheme for assigning beneficiaries and financing the Combined Benefit Fund reflects Congress's intent that all assignments be completed by October 1, 1993.

Id. According to the Sixth Circuit, those beneficiaries not assigned to a particular coal company by the October 1, 1993 deadline must be placed in the "unassigned pool." *Id.* at 1062. Thus, the health benefit premiums for those beneficiaries must be shared proportionally by all coal companies in the industry. *Id.* at 1055.

In the instant matter, Defendants concede that the Sixth Circuit's decision in *Dixie Fuel* controls the outcome of this case and that under *Dixie Fuel*, the Commissioner unlawfully assigned the Bellaire Group 270 beneficiaries after October 1, 1993. The Commissioner, for example, summarized his position as follows:

> Plaintiffs have moved for summary judgment on Count IV of their Complaint. They note that some initial assignments of retired miners and dependants to plaintiffs under the [Coal Act] were not made until after September 30, 1993. They contend that the holding in *Dixie Fuel* . . . requires the conclusion that any such assignments after September 30, 1993 are void. This appears to be a correct reading of what *Dixie [Fuel]*, if correctly decided, would require.

(Doc. # 17 at 1.) The Trustees agree with the Commissioner that this Court is bound by the decision in *Dixie Fuel*. (Doc. # 20 at 2.) Although Defendants agree that this Court is bound by the decision in *Dixie Fuel*, they assert that the Sixth Circuit incorrectly decided that case. Therefore, Defendants are opposing the instant motions in order "to preserve their right to challenge *Dixie Fuel* in further appellate proceedings." (*Id.* at 2.)

After considering the facts and circumstances of this case, the Court finds that it is bound by the Sixth Circuit's decision in *Dixie Fuel*. Therefore, the Court finds that the 270 initial assignments made by the Commissioner to the Bellaire Group are void as a matter of law. Accordingly, the Court GRANTS the Bellaire Group's motions for partial summary judgment as they relate to the 270 beneficiaries named in Count IV of the Complaint. In granting the Bellaire Group's motions for partial summary judgment, the Court finds that the Bellaire Group is entitled to a credit for all premiums previously paid for these unlawfully assigned beneficiaries. That is, the Court hereby ORDERS the Trustees to credit the accounts of the Bellaire Group for the payments previously made for the 270 beneficiaries at issue in Count IV of the Complaint.

Furthermore, the Court finds that the Bellaire Group is entitled to injunctive relief in this case. In light of this ruling, the Court hereby ENJOINS Defendants from collecting any further premium payments for the 270 beneficiaries initially assigned to the Bellaire Group after October 1, 1993. In addition, the Court also ENJOINS Defendants from assigning any additional previously unassigned beneficiaries to the Bellaire Group. The Court finds that such injunctive relief is

necessary in this instance because the Bellaire Group will suffer irreparable injury in the absence of an injunction and there is no adequate remedy at law to protect the Bellaire Group.

III. THE MOTION FOR THE ENTRY OF FINAL JUDGMENT

In this case, the Bellaire Group moves this Court for the entry of final judgment with respect to Count IV of the Complaint. Specifically, the Bellaire Group contends that there is no just reason to delay the entry of final judgment with respect to Count IV "for the year or more that it will take to resolve the remainder of the case." (Doc. # 38 at 2.) The Court now considers the merits of that motion.

A. The Standard of Review

Pursuant to Rule 54(b), a district court hearing an action involving multiple claims may enter final judgment with respect to some but not all of the claims upon an "express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. Pro. 54(b) (1999). The Rule "is intended to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants." *Day* v. *NLO, Inc.*, 3 F.3d 153, 155 (6th Cir. 1993) (internal quotations omitted).

Rule 54(b) only applies to final judgments. *See Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 7 (1980). With respect to this requirement, "[i]t must

be a judgment in the sense that it is a decision upon a cognizable claim for relief, and it must be final in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Id.* (internal citations and quotations omitted). If the court determines that the judgment is *final*, it must then determine whether there is any just reason to delay an appeal of the judgment. *See id.* In making this determination, the court must take into consideration the judicial administrative interests and the equities involved. *See id.* The court must also consider other relevant factors, including (1) whether the claims under review are separable from the other remaining claims; (2) whether an appellate court would have to decide the same issues more than once if there were subsequent appeals; and (3) whether possible delay and expense to the parties weigh against an appeal at the present time. *See id.*; *see also Day*, 3 F.3d at 155.

B. Application to the Instant Matter

In this case, the Court finds that its decision in Section II.B of this Opinion and Order constitutes a final judgment. The Bellaire Group sets forth a cognizable claim for relief in Count IV and this Court's decision granting summary judgment for the Bellaire Group is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtiss-Wright*, 446 U.S. at 7. That is, this Court's decision with respect to Count IV is final in the sense that is completely resolves that claim and finds that the Bellaire Group is entitled to summary judgment as a matter of law.

In addition, the Court also finds that Count IV of the Complaint is separate and distinct from the other five

claims brought in this action. Count IV "does not overlap factually with any other claims, nor does it involve similar propositions of law." (Doc. # 28 at 2.) To the contrary, Count IV of the Complaint involves "a purely legal question" not raised in any of the other counts of the Complaint. Therefore, because the issues raised in Count IV are unique to that count, it is considerably unlikely that the Sixth Circuit will have to revisit these issues in a future appeal of the remaining claims.

Moreover, the Court finds that there is no just reason to delay the appeal of this Court's decision. The issues raised in Count IV of the Complaint are of great social importance and impact a wide population of retirees and their dependants. Furthermore, any costs that will be incurred due to a separate appeal at this time will be minimal. Thus, the Court finds that an appeal at this time will best serve the interests of justice. Accordingly, the Court GRANTS the Bellaire Group's motion. There is no just reason for delay and the entry of final judgment is appropriate with respect to Count IV of the Complaint.

IV. CONCLUSION

Upon consideration and being duly advised, the Court GRANTS the Bellaire Group's motions for partial summary judgment and injunctive relief with respect to Count IV of the Complaint. In addition, the Court GRANTS the Bellaire Group's motions for the entry of final judgment with respect to that Count of the Complaint. That is, the Court finds that its judgment with respect to Count IV is final and there is no just reason to delay the appeal of this Court's decision.

Accordingly, the Court directs the Clerk of Court to enter final judgment with respect to Count IV of the Complaint.

IT IS SO ORDERED.

/s/ JOSEPH P. KINNEARY
JOSEPH P. KINNEARY
UNITED STATES
DISTRICT JUDGE

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-4080, 00-4082 and 00-6239

BELLAIRE CORPORATION, ET AL.; PEABODY COAL COMPANY, ET AL., PLAINTIFFS-APPELEES

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL., DEFENDANT-APPELLANT,

MICHAEL H. HOLLAND, ET AL.
INTERVENING DEFENDANTS

[Filed: Dec. 6, 2000]

ORDER

The court having received two petitions for hearing en banc, and the petitions having been circulated to all active judges of this court, and no judge of this court having favored the suggestion,

It is **ORDERED** that the petitions be and hereby are **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-6099

DIXIE FUEL COMPANY, PLAINTIFF-APPELLANT

v.

COMMISSIONER OF SOCIAL SECURITY; DARRELL BLEVINS, SOCIAL SECURITY FREEDOM OF INFORMATION ACT OFFICER; KENNETH S. APFEL, COMMISSIONER, DEFENDANTS-APPELLEES

Argued Sept. 22, 1998
Decided March 25, 1999

Before: WELLFORD, NORRIS, and BATCHELDER, Circuit Judges.

BATCHELDER, Circuit Judge.

Plaintiff Dixie Fuel Company ("Dixie Fuel") appeals from the order of the district court denying its motion for a temporary restraining order, and preliminary and permanent injunctive relief to prevent the Social Security Administration ("SSA") from assigning beneficiaries under the Coal Industry Retirement Health Benefit Act ("Coal Act"), 26 U.S.C.A. §§ 9701-9722 (West Supp. 1998), to Dixie Fuel. For the reasons enumerated below, we find that the district court erred in denying Dixie Fuel's motion for injunctive relief and thus, we reverse.

I. THE COAL ACT

In 1992, Congress enacted the Coal Act in an attempt to create additional financing for the health benefits fund of the United Mine Workers of America ("UMWA"). Under the Coal Act, the Social Security Administration was responsible for "assigning" eligible UMWA retirees and their dependants to current and former signatory coal operators [1] (or "related persons"[2] in accordance with the criteria set forth at 26 U.S.C. § 9706.[3] The statute specifies that "the Commissioner of Social Security shall, before October 1, 1993," make these assignments. 26 U.S.C. § 9706(a).

Those companies which have been assigned beneficiaries by the SSA ("assigned operators") are required to pay premiums for these beneficiaries directly to the UMWA Combined Benefit Fund. 26 U.S.C. § 9704. Beneficiaries not assigned to a signatory operator or

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[1] A signatory operator is defined by the Act as: "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. § 9701(c)(1).

[2] A related person is defined as:

> (i) a member of the controlled group of corporations . . . ; (ii) a trade or business which is under common control . . . ; or (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

26 U.S.C. § 9701(c)(2)(A). The SSA assigned beneficiaries to Dixie Fuel as a "related person" to V & C Coal, which was not in business at the time the Act was passed. Although Dixie Fuel contested this determination below, it is not relevant to this appeal.

[3] Essentially, an assignment is made based upon the work history of the miner and the signatory (or related person) and the "in business" status of the miner's employers.

related company go into the "unassigned pool." 26 U.S.C. § 9704(d). After exhaustion of specifically designated funds,[4] the premiums for the miners in the unassigned pool will be assessed proportionally against all assigned operators. 26 U.S.C. § 9704(d).

Under the Coal Act, if an assigned operator believes that it has been assigned beneficiaries in error, it may obtain information about the beneficiaries from the SSA and seek review of the assignment. 26 U.S.C. § 9706(f); *see also* 20 C.F.R. §§ 422.601-607. The burden is on the assigned operator to make out a prima facie case that the assignments were in error. *See* 20 C.F.R. § 422.605. The Commissioner then reviews the assignments; if he determines that the assignments were in error, he has the authority to declare them void and to

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[4] At the Coal Act Hearing in 1995, the Acting SSA Commissioner described the funding sources:

> The Coal Act provides for financial stability of the Combined Benefit Fund by drawing from three constituent sources. First, the beneficiaries themselves were required to participate by the transfer of $210 million from the 1950 Pension Trust in three installments of $70 million in each of the first three plan years. This has been enough to cover the cost of providing benefits to the "unassigned" or orphan beneficiaries in the Combined Fund during these years. (For an additional ten years, transfers from the Abandoned Mine Reclamation Fund are expected to continue to cover this unassigned beneficiary cost).

Coal Industry Retiree Health Benefit Act of 1992: Hearing on S. 103-59 Before the House Subcomm. on Oversight of the Comm. on Ways and Means, 104th Cong. (1995) [hereinafter *1995 Coal Act Hearing*] (Statement of Acting SSA Comm'r, Lawrence H. Thompson). Currently, assigned operators have not been assessed any unassigned beneficiary premiums because the other two sources have been sufficient to provide benefits. *Id.* (Testimony of UMWA Combined Fund Executive Dir. Russell U. Crosby).

reassign the beneficiaries to the appropriate signatory operator or related entity. 26 U.S.C. § 9706(f)(3)(A). If he determines that the assignments are not in error, he must notify the assigned operator. The Commissioner's determination is final. 26 U.S.C. § 9706(f)(3)(B), (f)(4).

II. DIXIE FUEL COMPANY & PROCEDURAL HISTORY

Plaintiff-Appellant Dixie Fuel was never a signatory to the UMWA labor agreements referenced in the Act. However, the SSA has deemed Dixie Fuel to be a related company to the V & C Coal Company ("V & C"), a signatory which is no longer in existence. Since September 1995, the SSA has assigned Dixie Fuel more than fifty beneficiaries who were former employees of V & C and maintains that Dixie Fuel is responsible for these beneficiaries. Dixie Fuel has estimated its current liability based on these assignments at approximately $500,000.00, exclusive of interest and penalties. Almost all of the beneficiaries assigned to Dixie Fuel came from the "unassigned pool." [5]

Dixie Fuel sought SSA review of the assignments, and has made requests under the Freedom of Information Act ("FOIA") to gain information in support of its request. In order to submit further information in support of its challenge to these assignments, Dixie Fuel has requested extensions of time in the review process.

On July 30, 1997, Dixie Fuel filed a Verified Claim in the district court for the Eastern District of Kentucky seeking declaratory and injunctive relief voiding these

[5] Dixie Fuel's challenge to the assignment to it of beneficiaries initially assigned to another assigned operator is not the subject of this appeal.

assignments. Contemporaneously, Dixie Fuel filed a motion for a temporary restraining order enjoining the SSA from assigning it any more beneficiaries, requiring the SSA to notify the Combined Fund that assignments to Dixie Fuel are void, and enjoining the SSA from withholding information requested by Dixie Fuel in its FOIA requests. The district court denied all injunctive relief to Dixie Fuel,[6] ruling solely that the agency's interpretation of § 9706(a) as allowing the SSA to assign beneficiaries from the unassigned pool after October 1, 1993, is reasonable and entitled to deference. Dixie Fuel now brings this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) from the district court's denial of its motion for injunctive relief.

At oral argument, the SSA conceded that the particular assignments at issue are void under the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451 (June 25, 1998). The SSA argued that this concession moots the issue before this Court.

[6] The district court entertained oral argument on Dixie Fuel's motion for a temporary restraining order, after which, at the court's request, the parties filed additional briefs on the issue of whether the October 1, 1993, date in 26 U.S.C. § 9706(a) was the deadline for assigning of beneficiaries. Although the district court's subsequent order states that "plaintiff's motion for a temporary restraining order, preliminary and permanent injunction is denied," the order also states that "[a]t this point in time the court cannot find that the plaintiff will succeed on the merits of its case," and that "injunctive relief is not appropriate at this time."

III. DISCUSSION

We will first address whether the SSA's concession at oral argument moots this appeal. Second, we will address the district court's jurisdiction over the issues below. Finally, we will consider the denial of injunctive relief.

A. MOOTNESS

The SSA's concession at oral argument did not render this appeal moot. A party's voluntary cessation of an allegedly illegal activity does not moot the issue of whether prospective injunctive or declaratory relief is proper. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L.Ed.2d 152 (1982); *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1198 (D.C. Cir. 1985) (holding that even when an administrative agency ceases illegal conduct, the case is not moot); *Blinder, Robinson & Co. v. United States Sec. & Exch. Comm'n*, 692 F.2d 102, 106-07 (10th Cir. 1982) (same); *Hooker Chem. Co., Ruco Div. v. United States EPA*, 642 F.2d 48, 52 (3d Cir. 1981). However, "[s]uch abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power." *City of Mesquite*, 455 U.S. at 289, 102 S. Ct. 1070.

Equally importantly, *Eastern Enterprises* did not address the issue that Dixie Fuel asks us to decide here. *Eastern Enterprises* held that the Coal Act's retroactive allocation of beneficiaries, as applied to Eastern, violates the Takings Clause of the Fifth Amendment. *Eastern Enterprises*, 118 S. Ct. at 2153.

Dixie Fuel seeks not only to void the assignments already made to it, but to enjoin the SSA from making any new assignments, not because such assignments might violate the Fifth Amendment, but because the Coal Act does not permit the SSA to make any assignments at all after October 1, 1993.[7] The defendant who seeks to have a case dismissed as moot must demonstrate that "there is no reasonable expectation that the alleged wrongs will be repeated," *Blinder, Robinson & Co.*, 692 F.2d at 106-07 (*citing United States v. W.T. Grant Co.*, 345 U.S. 629, 73 S. Ct. 894, 97 L.Ed. 1303 (1953)). Although the SSA conceded that these particular assignments to Dixie Fuel were void under *Eastern Enterprises*, it did not concede that it may not or would not again assign beneficiaries to Dixie Fuel. Therefore, the case is not moot and we may reach the merits of the appeal.

B. DISTRICT COURT'S JURISDICTION

Dixie Fuel asserts that the district court had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. §§ 552 & 702 (the Administrative Procedure Act). The SSA contends that the lower court lacked subject matter jurisdiction because Dixie Fuel has not sought a final decision by the SSA and has therefore failed to exhaust its administrative remedies. The court below did not address the challenge to its jurisdiction.

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[7] As we shall discuss more fully later in this opinion, the statute actually says that the assignments shall be made "before October 1, 1993." 26 U.S.C. § 9706(a). This would mean, of course, that no assignments could be made after September 30, 1993. Solely in order to avoid confusion, we will use the October 1, 1993, designation throughout this opinion.

1. Jurisdictional Bases

The district court has jurisdiction under 28 U.S.C. § 1331 to review agency actions, subject only to statutes precluding such review, *see Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977). The Administrative Procedure Act (APA), is not an independent grant of jurisdiction, *see id.* at 107, 97 S. Ct. 980; rather, it provides the framework for judicial review of agency actions.[8] Indeed, the Supreme Court has explained that the APA "'embodies the basic presumption of judicial review'" available to those aggrieved by agency action. *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 56-57, 113 S. Ct. 2485, 125 L.Ed.2d 38 (1993) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L.Ed.2d 681 (1967)).

Although 28 U.S.C. § 1331 provides the statutory basis for jurisdiction, Dixie Fuel still must demonstrate that its claims are ripe for adjudication and, if appropriate, that it has exhausted its administrative remedies.

2. Ripeness

The district court is limited by Article III, § 2 of the U.S. Constitution to the adjudication of actual cases or controversies. Thus, the exercise of jurisdiction requires that the case be ripe for review. The ripeness

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[8] *See* 5 U.S.C. § 701(a), which provides "[t]his chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law;" and 5 U.S.C. § 702, which in pertinent part provides "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

doctrine exists to ensure that courts decide "only existing, substantial controversies, not hypothetical questions or possibilities." *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989).

Under the APA, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Even in the absence of final agency action, a case may be considered ripe when there is no compelling judicial interest in deferring review. The court should consider whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581, 105 S. Ct. 3325, 87 L.Ed.2d 409 (1985); *Abbott Lab.*, 387 U.S. at 149, 87 S. Ct. 1507, *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977); *see also Mississippi Valley Gas Co. v. Federal Energy Regulatory Comm'n*, 68 F.3d 503, 508 (D.C. Cir. 1995).

"Under the fitness prong . . . , we are to consider the nature of the challenged issue and inquire whether the agency action is sufficiently final for review. . . . When a petitioner 'raises a purely legal question,' we assume that issue is suitable for judicial review." *Mississippi Valley Gas Co.*, 68 F.3d at 508 (citations omitted); *see also Thomas*, 473 U.S. at 581, 105 S. Ct. 3325 ("The issue presented in this case is purely legal, and will not be clarified by further factual development.")

The Coal Act provides that challenged assignment decisions become final after review by the Commissioner of Social Security and notice to the assigned

operator of the Commissioner's determination. 26 U.S.C. § 9706(f)(4). However, one court notes that "[t]he Secretary's decision to assign beneficiaries to [a signatory or related person] pursuant to the Coal Act is a final agency decision and hence, reviewable under the APA." *Bellaire Corp. v. Shalala*, 995 F. Supp. 125, 145 (D.D.C.1997). We recognize that Dixie Fuel filed this action before the review by the Commissioner was complete. However, whether the SSA has the statutory power to assign beneficiaries after October 1, 1993, is a "purely legal question" on which the Commissioner has taken a clearly defined position; there is no indication that the SSA intends to reconsider this question of law in any further administrative action. To require Dixie Fuel to obtain a final agency decision under these circumstances would impose substantial hardship, since Dixie Fuel must either continue to pay the premiums attributable to the challenged assignments or incur the penalties for failure to make those payments. 26 U.S.C. §§ 9706(f)(5), 9707. In this case, as in *Thomas*, "[n]othing would be gained by postponing a decision." *Thomas*, 473 U.S. at 582, 105 S. Ct. 3325. We hold that the Commissioner's decisions assigning beneficiaries to Dixie Fuel are judicially reviewable under the APA.

3. Exhaustion of Administrative Remedies

The Commissioner contends that even if the assignments of beneficiaries to Dixie Fuel are considered final decisions under the APA, the federal court lacks jurisdiction over this matter because Dixie Fuel has not exhausted the administrative remedies provided in § 9706(f). Dixie Fuel counters that its challenge is to the purely legal issue of the Commissioner's statutory authority to make assignments after October 1, 1993, and, in any event, the Coal Act does not contain a

comprehensive review process sufficient to permit Dixie Fuel to obtain a genuine review of this legal issue.

Under the doctrine of exhaustion of administrative remedies, a party is not entitled to judicial relief for an actual or threatened injury until the requisite administrative remedies have been exhausted. *See, e.g., McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L.Ed.2d 194 (1969) (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L.Ed. 638 (1938)). However, the Supreme Court has long held that, at least in non-APA cases, the exhaustion requirement is far from absolute. "Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S. Ct. 1081, 117 L.Ed.2d 291 (1992) (internal citations omitted).

It was not until *Darby v. Cisneros*, 509 U.S. 137, 144-54, 113 S. Ct. 2539, 125 L.Ed.2d 113 (1993) that the Supreme Court addressed the issue of whether a litigant who seeks judicial review of agency action under the APA must first exhaust all administrative remedies. In *Darby*, the Court held that in actions brought under the APA, the courts lack discretion to require exhaustion unless it is "expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Id.* at 154, 113 S. Ct. 2539. The Court pointed out that "[a]lthough § 10(a) [5 U.S.C. § 702] provides the general right to judicial review of agency

actions under the APA, § 10(c) [5 U.S.C. § 704][9] establishes when such review is available." *Id.* at 146, 113 S. Ct. 2539. "While federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review, § 10(c), by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates." *Id.* Darby also made the point that "the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality," *id.* at 144, 113 S. Ct. 2539.

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Id. (citation omitted).

The Coal Act does not specifically require exhaustion of remedies before judicial review. *See* 26 U.S.C. § 9706(f)(2). At most, the Act provides an avenue that an assigned operator may take to obtain review of the factual basis for the assignment of particular beneficiaries. The regulations promulgated to implement the

[9] Section 704 provides, in pertinent part: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

Coal Act similarly contain no mandate of exhaustion of remedies before an aggrieved assigned operator may seek judicial review of the assignment of beneficiaries. The Act does specifically require that "an assigned operator pay the premiums [for its assigned beneficiaries] pending review by the Commissioner of Social Security or by a court under this subsection." 26 U.S.C. § 9706(f)(5).

We have already held that the decision of the Commissioner assigning these beneficiaries to Dixie Fuel was a final decision. We hold further that because this action was brought under the APA, and because the Coal Act and its attendant regulations do not mandate exhaustion of remedies and do not provide that the Commissioner's decision is "inoperative" pending appeal, the district court did not have discretion to require Dixie Fuel to exhaust its administrative remedies before pursuing this action.

Accordingly, we hold that the district court's exercise of jurisdiction in this action was proper.

C. DENIAL OF INJUNCTIVE RELIEF

In deciding whether to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (citing *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996)). "A district court is required to make specific findings concerning each of the four factors, unless fewer are dispositive of the issue." *Inter-*

national Longshoremen's Ass'n, Local 1937 v. Norfolk Southern Corp., 927 F.2d 900, 903 (6th Cir. 1991).

Ordinarily, the scope of our review of a district court's denial of a preliminary injunction is limited to determining whether that court abused its discretion in finding that the plaintiff likely would not prevail on the merits and in finding insufficient harm to the plaintiff and harm to the defendant and to the public interest. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S. Ct. 2169, 90 L.Ed.2d 779 (1986). We will reverse the district court only if we find that it "relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard," *Connection Distrib. Co.*, 154 F.3d at 288, and we review the district court's conclusions of law *de novo* and findings of fact for clear error, *Golden*, 73 F.3d at 653.

The Supreme Court, however, has held that this approach, although it is the norm, is not absolute. *Thornburgh*, 476 U.S. at 756-57, 106 S. Ct. 2169. In that case, the Court explained that "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Id.* at 757, 106 S. Ct. 2169. The Court went on to approve the Court of Appeals' plenary review as to the applicable law, holding "[t]hat a court of appeals ordinarily will limit its review in a case of this kind to abuse of discretion is a rule of orderly judicial administration, not a limit on judicial power." *Id.*

This circuit, in *United States v. State of Michigan*, 940 F.2d 143 (6th Cir. 1991) has addressed this issue as well:

> This court has also recognized the scope of appellate jurisdiction over issues involving injunctive relief:
>
> It is elementary that an appeal from the denial of injunctive relief brings the whole record before the appellate court and that the "scope of review may extend further [than the immediate question on which the District Court ruled] to allow disposition of all matters appropriately raised by the record, including entry of final judgment."

Id. at 151-52 (alterations in original) (citations omitted).

In the case before us, the issue is the purely legal question of whether the statute permits the SSA to make any assignments after October 1, 1993. If the statute does not, then Dixie Fuel is entitled, not only to a preliminary injunction, but a permanent one, at least with regard to any initial assignments of beneficiaries to Dixie Fuel after that date. Accordingly, we will proceed with plenary review of this issue.

The statute at issue reads, in pertinent part: "For purposes of this chapter, the Commissioner of Social Security *shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator. . . ." 26 U.S.C. § 9706(a) (emphasis added).

The SSA has made two arguments over the course of this action justifying its assignment of beneficiaries to Dixie Fuel after October 1, 1993. First, SSA claimed in its Response to the Plaintiff's Motion for a Temporary Restraining Order, that unassigned beneficiaries are considered "assigned" to the unassigned pool under the meaning of the Act; thus, any assignments to Dixie Fuel after the October 1, 1993, date were actually

"reassignments" under the Act. Dixie Fuel admits that the SSA has statutory authority under 26 U.S.C. § 9706(f)(3)(A)(ii) to make reassignments after October 1, 1993. This argument is unsupported by the SSA's own regulations: "Assignment means our selection of the coal operator or related person to be charged with the responsibility of paying the annual health and death benefit premiums of certain coal miners and their eligible family members." 20 C.F.R. § 422.602. Clearly, no such selection occurs when the beneficiary remains "unassigned." Apparently, however, the SSA abandoned this argument in its Supplemental Memorandum to the district court and in its brief to this Court, in which the SSA admits: "The 'unassigned pool,' by its name alone, demonstrates that its members have *not been assigned*." Appellee's Br. at 15 n. 2 (emphasis added).

The second argument, while not mentioned in the original Response to Dixie Fuel's Motion for a T.R.O., was set forth in the Supplemental Memorandum to the district court as well as in the SSA's brief to this Court. The SSA argues that the October 1, 1993 date contained in the statute is not a jurisdictional mandate, but merely a direction to "spur the SSA into prompt action." Dixie Fuel, of course, asserts that the language of the statute, the legislative history, and congressional intent reflect that the date in the statute was meant to be and has been understood as a mandate terminating the SSA's authority to assign beneficiaries.

The district court concluded, *inter alia*: (1) the interpretation of a statute by the agency charged with executing provisions of the statute is entitled to deference; (2) a statutory direction to an agency to carry out action within a fixed time does not limit the authority of

the agency after that time absent express language; and (3) the agency's power to assign these miners to Dixie Fuel is consistent with congressional intent. The district court did not consider whether the language of the statute plainly evidenced congressional intent, a prerequisite to deciding whether an agency's interpretation should be accorded deference. *See Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).

When reviewing an agency's construction of a statute that the agency is empowered to administer, this court must ask the *Chevron* questions: First, has Congress spoken directly to the precise issue? If Congress has directly spoken, then we must give effect to the unambiguously expressed intent of Congress. However, if the statute is silent or ambiguous on the issue, then is the agency's interpretation a permissible construction of the statute? *Id.*

The language of 26 U.S.C. § 9706(a) is plain on its face: "The Commissioner of Social Security *shall, before October 1, 1993*, assign each coal industry retiree . . . to a signatory operator which (or any related person with respect to which) remains in business. . . ." The Supreme Court has held in any number of contexts that "shall" is "explicitly mandatory" language. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 607, 109 S. Ct. 2657, 105 L.Ed.2d 512 (1989) ("Congress could not have chosen stronger words [than 'shall order forfeiture'] to express its intent that forfeiture be mandatory. . . ."); *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 534 n. 15, 107 S. Ct. 2542, 96 L.Ed.2d 461 (1987) (contrasting omission of mandatory language in preamble of Hague Conference on Private International

Law with use of mandatory language ("The present Convention shall apply . . .") in preamble of Hague Service Convention); *Hewitt v. Helms*, 459 U.S. 460, 471, 103 S. Ct. 864, 74 L.Ed.2d 675 (1983) ("[The Commonwealth] has used language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed" with regard to placing inmate in administrative segregation.), *abandoned on other grounds*, *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L.Ed.2d 418 (1995); *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S. Ct. 428, 91 L.Ed. 436 (1947) ("The word 'shall' is ordinarily 'The language of command.'") However, the Court has also held that "the mere use of the word 'shall' . . . standing alone" was not sufficient to terminate the power of the Secretary of Labor to recover misused funds after the expiration of the statutory period within which the Secretary was to act. *Brock v. Pierce County*, 476 U.S. 253, 262, 106 S. Ct. 1834, 90 L.Ed.2d 248 (1986).[10]

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[10] *Pierce County* involved a provision in the Comprehensive Employment and Training Act ("CETA"), an act which required qualified entities receiving federal grants for job training programs to comply with the statute and regulations enacted thereunder. *Pierce County*, 476 U.S. at 255, 106 S. Ct. 1834. CETA provided that the Secretary of Labor was to investigate whenever he has reason to believe that a grant recipient was misusing grant funds, and further provided that the Secretary "shall" determine "the truth of the allegation or belief involved, not later than 120 days after receiving the complaint." *Id.* at 255-56, 106 S. Ct. 1834.

The Secretary withheld a portion of Pierce County's grant funds after the 120 days had expired and Pierce County challenged the Secretary's authority to do so, arguing that the statute divested the Secretary of authority after the specified time period. *Id.* at 256-57, 106 S. Ct. 1834. The Supreme Court found that use of the word "shall," standing alone and in the face of a contrary indication from the rest of the statute, was insufficient to remove the Secretary's power to act after 120 days. *Id.* at 262, 106 S. Ct. 1834.

The use of the word "shall" in 26 U.S.C. § 9706(a) is not a "mere use . . . standing alone." *Id.* No provision of the Coal Act so much as hints that the October 1, 1993, date is not a deadline. To the contrary, the entire statutory scheme for assigning beneficiaries and financing the Combined Benefit Fund reflects Congress's intent that all assignments be completed by October 1, 1993. It is not necessary to engage in an exhaustive analysis of the Coal Act to illustrate this point. A look at the interaction of only a few sections is more than sufficient.

"Assigned operator" is defined in § 9701(c)(5): "The term 'assigned operator' means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706." Definitionally, then, there are no "assigned operators" until beneficiaries have been assigned under § 9706.

The liability of assigned operators is set out in § 9704. Under § 9704(a), the liability of assigned operators for payment of annual premiums is based in part on the "unassigned beneficiaries premium" for which that assigned operator is determined to be responsible under § 9704(d).

The "unassigned beneficiaries premium" for which an assigned operator is liable for any plan year, as set out in § 9704(d), is "equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries

who are not assigned under section 9706 to any person for such plan year."

"Applicable percentage," for purposes of determining the liability of assigned operators, is defined in § 9704(f)(1) to mean "with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993)."

The "applicable percentage" for any assigned operator is subject to annual adjustments for plan years beginning after October 1, 1994. Those adjustments are set out in § 9704(f)(2):

> In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under [§ 9704(f)(1)] by making the following changes to the assignments as of October 1, 1993:
>
> > (A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).
> >
> > (B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

In short, the calculation of the obligation of every assigned operator for payment of unassigned beneficiary premiums is dependent upon the completion of the assignment of beneficiaries by October 1, 1993. Furthermore, the statute expressly provides for making adjustments beyond that date, but those adjustments are all premised on the assignments' having been completed before October 1, 1993. This statutory scheme simply is not comparable to that addressed by the Court in *Brock v. Pierce County*.

Neither does the Coal Act present the kind of situation that concerned the Court in *Pierce County*, namely, a lack of consequences resulting from the agency's failure to act within the timeframe of the statute. *See Pierce County*, 476 U.S. at 259-60, 106 S. Ct. 1834. Despite the Commissioner's best efforts to make the case that if the October 1, 1993, date is held to be a deadline, there is no consequence contained within the statute for the Commissioner's failure to make the assignments by that date, his argument fails. Beginning on October 1, 1993, there are only two kinds of eligible beneficiaries: those who were assigned to assigned operators pursuant to the provisions of § 9706(a) and those who were not. The consequence flowing from the failure of the Commissioner to make those assignments before October 1, 1993, is clear from the plain language of the statute: the eligible beneficiaries who were not assigned are the *unassigned beneficiaries*. The premiums that every assigned operator must pay into the Combined Benefits Fund are calculated on the basis of those beneficiaries assigned to it and its aliquot share of the unassigned beneficiaries.

By specifying in the statute that "the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree . . . to a signatory operator," and by resting the entire scheme for calculation of premiums of the assignments made as of that date, Congress did speak directly and unambiguously on the issue of when the Commissioner's authority to make those assignments expired. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778.

We hold that the plain language of the statute is the end of the matter. The attempt of the SSA to create an ambiguity by pointing to the absence of specific language that says "and after October 1, 1993, the Commissioner shall not make any assignments," is misguided. Equally misguided is the attempt of the SSA to create an ambiguity by looking at the legislative history of the Coal Act. Indeed, in this case, as was the case in *I.N.S. v. Cardoza- Fonseca*, 480 U.S. 421, 107 S. Ct. 1207, 94 L.Ed.2d 434 (1987), "[t]he message conveyed by the plain language of the Act is confirmed by an examination of its history." *Id.* at 432, 107 S. Ct. 1207. We ought not look at the legislative history at all, but if we do, we need look no farther than the Conference Report to confirm that this legislation intended that all assignments of beneficiaries be made before October 1, 1993. While the Commissioner correctly notes that the Conference Report expressly states "[t]he conferees intend that the largest possible number of beneficiaries in the Plans be assigned to a specific or designated company," 138 Cong. Rec. S17,605 (daily ed., Oct. 8, 1992), he neglects to point out that this statement ap-

pears in the context of the Report's explanation of the order in which the statute requires that the signatory operators and related persons are to be assigned beneficiaries for whom they may be held responsible. Significantly, the Commissioner also neglects to mention that the statement he quotes is preceded by a lengthy explanation of how the unassigned beneficiary premiums are to be calculated. including this:

> As a practical matter, not all beneficiaries can be assigned to a specific last signatory operator, related person or assigned operator for payment purposes. This is because in some instances, none of those persons remain in business, even as defined to include non-mining related businesses. Thus, provisions are made for unassigned beneficiary premiums. In each plan year each assigned operator will pay a premium earmarked to cover the health costs of these unassigned beneficiaries.
>
> The amount of the unassigned beneficiary premium payable by each assigned operator will be calculated on the basis of the number of beneficiaries assignable to each operator as of October 1, 1993. . . .
>
> The first plan year is an eight-month period running from February 1, 1993 through October 1, 1993. . . . In the first plan year the Secretary of HHS will review the work history of each beneficiary and will prepare the assigned operator allocations which are *required to be made by October 1, 1993.*

Id. (emphasis added).

Because the statute is clear and unambiguous, there is no reason even to look to the legislative history. In

any event, the legislative history confirms the intent of Congress clearly expressed in the statute. The October 1, 1993 date is a deadline.

"[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778. Where the statute is clear, the agency has nothing to interpret and the court has no agency interpretation to which it may be required to defer. That is the case here. We therefore do not address the Commissioner's arguments with regard to the deference to which he claims the SSA's interpretation of this statute is entitled.

Because the statute requires that the SSA make all assignments of beneficiaries before October 1, 1993, it does not permit the SSA to make such assignments after that date. We therefore hold that the district court erred as a matter of law in holding that the SSA's contrary interpretation of the statute was entitled to deference.

IV. CONCLUSION

For the foregoing reasons, we reverse the District Court's order denying Plaintiff's motion for injunctive relief as to all assignments of beneficiaries made after September 30, 1993. We remand this matter to the district court for further proceedings not inconsistent with this opinion with regard to those few assignments to Dixie Fuel that may have been reassignments of beneficiaries initially assigned before October 1, 1993.